No. 94-1376

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ZARKO ILIC,

Petitioner,

vs.

LIQUID AIR CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent arguments defend the U.S. Magistrate Judge, factual findings that are clearly erroneous, unsupported by the evidence or are contrary to the evidence.

Respondent does not even address any perceived misstatements of fact in Petition, in its Opposition, because there are NONE.

The Court of Appeals grossly misapplied the standard of review by deferring to district court clearly erroneous findings.

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE QUESTION WHETHER THE DECISION BY THE ELEVENTH CIRCUIT, THAT THERE IS SIMPLY NO MERIT IN ANY OF THE ISSUES OR CONTENTIONS PRESENTED BY THE APPELLANT, IS IN CONFLICTS WITH SUPREME COURT: WATSON V. FORT WORTH BANK AND TRUST, 108 S. CT. 2777 (1988).

This Court in Watson state: "We granted certiorari to determine whether the District Court or the Court of

Appeals properly held disparate impact analysis inapplicable to a subjective or discretionary promotion system, and we now hold that such analysis may be applied.

The Eleventh Circuit decision that, there is simply no merit in any of the issues or contentions presented by the appellant should be vacated.

Respondent's argument that this is not a class action case ignore the fact that whether in name or not, the suit is perforce a sort of class action for fellow employees similarly situated. If Ilic obtains vacated decision from this Court he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority.

Respondent argue that the U.S. Magistrate Judge, finding "Given the attitude that Mr. Ilic had displayed ..., that Ilic was not qualified to manage the plant ..." can be used as business necessity defense. (Opp. 5). This finding is clearly erroneous, unsupported by the evidence, contrary to the evidence and bias. This is just a "tip of the ice berg."

Also, the Magistrate Judge made remarks about employer's promotion policy which are inconsistent with

his finding: "THE COURT: Well, the case law says that the company's can better protect themselves if they post those. I mean that's a legitimate, that is not a per se violation not to post notice. It leaves the company open to a charge of discrimination and the case law supports that. ... THE COURT: I think the employer just leaves itself at risk. An adverse inference could be drawn."

Shortly before the trial Respondent began posting notices of openings in salaried job.

First, under disparate impact analysis, Ilic is challenging the legitimacy of the selection system itself. He cannot be required to prove that he qualified for promotions under a system he alleges to be discriminatory unless the legitimacy of that system is first established. Nor can the plaintiff be required to reconstruct a valid selection system and demonstrate that under this system he would have received one or more of the promotions at issue.

Second, let us see some of these facts on the word attitude that Respondent claims as business necessity defense.

a) Position by Respondent was clear an the issue of why Ilic was not promoted. In this letter to EEOC dated

June 6, 1991, two years before trial, Respondent state: "As set forth more fully below, Mr. Ilic was not promoted to the Manager or Assistant Manager positions referred to in his Charge because he never indicated an interest in being promoted to these positions." (Pet. App. H, 20a). NO ATTITUDE HERE.

b) Also, during trial testimony of Mr. Lucht state: Q. Did you consider Zarko Ilic headed for promotion to the plant? A. No, did not. Q. Could you tell us why? A. Nobody ever called to say he wanted it." NO ATTITUDE HERE.

As shown, Ilic was not promoted "because he never indicated an interest" and "Nobody ever called to say he wanted it." and not because of an attitude. And that is why Ilic claim that Magistrate finding is clearly erroneous, unsupported by the evidence, contrary to the evidence and bias.

Respondent is using clearly erroneous, contrary to the evidence finding as business necessity defense.

c) Documentations show that Ilic was in charge during manager's absence for total of four weeks in 1989. Ilic then received a letter which state: "You knowledge of

the process and dedication to duty ... Thanks again for your cooperation." NO ATTITUDE HERE.

d) Letter from Vice President reads: "John McGrew, plant manager has a high opinion of him, he is knowledgeable on plant and computer, has been operator for 20 years and clearly deserve to do something else, for example become assistant plant Mgr or plant Mgr." NO ATTITUDE HERE.

e) Also, testimony of Vice President, Mr. Bruno Fraeyman, that Ilic received bonus for recognizing his efforts in training and that Ilic was giving training to new operators during his time. NO ATTITUDE HERE.

f) And testimony of Mr. Robert Ferguson alleged that he was asked to ask Mr. Ilic if he would be interested in a one-man plaint which is a manager position. NO ATTITUDE HERE.

II. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE QUESTION WHETHER THE DECISION OF THE ELEVENTH CIRCUIT IS IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUITS AND/OR

INCONSISTENT WITH PRECEDENT OF THE ELEVENTH CIRCUIT.

1. Respondent concede that Magistrate, an the issue here that Ilic in filling first questionnaire supplied by the EEOC has written the words "very outspoken", used against Ilic. (Opp. 8). Also, Magistrate finding: "Plaintiff asserted he was being retaliated against even before he filed a claim - a logical impossibility." clearly shows that circling wrong base of discrimination "retaliation" was used against Ilic. (Pet. App. D, 6a).

This shows that Magistrate prejudged issues.

Chief Judge Brown of the Fifth Circuit is clear an this issue. The most elementary principles of justice require us to remove this club and compel a battle on the *merits* of the controversy. Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970).

Not only that Magistrate did not compel a battle on the merits of the controversy but also used double standards.

This questionnaire that was filed by Ilic with EEOC in February 1991, was used against Ilic. The letter dated June 6, 1991 by Respondent filed with EEOC was clear an

its position why Ilic was not promoted, because he never indicated an interest in being promoted, was not used against Respondent. (Pet. App. H, 20a).

And that is a double standard.

Respondent claim that Antonopulos v. Aerojet-General Corp., E.D. Cal. 1968, 295 F.Supp. 1390, 1395 is misplaced. It is clear that Magistrate used this first questionnaire against Ilic and Judge MacBride said it should not be used against plaintiffs:

> We are not dealing with businessmen-plaintiffs or plaintiffs accustomed to consulting lawyers about their rights. This law is a remedial one, and the Congressional purpose would not be furthered by making plaintiffs of the kind with which we are concerned, members of the working class who are generally without substantial higher education, dot every "i" and cross every "t" on their way to the courthouse.

2. Respondent claim that Ilic has misunderstanding of what constitutes direct evidence of discriminatory intent. (Opp. 8).

If Vice President Mr. Fracyman stated: "Ilic if you file charges with EEOC you will be terminated." would that constitute direct evidence of retaliatory intent? Ilic filed charges with EEOC in March 1991 and in June 1991 was

terminated with fabricated facts and without any investigation.

If Ilic was asked to renounce his Eastern Orthodox Christmas for overtime an that day, would that be a direct evidence of a form of "quid pro quo harassment", in which supervisor demands that employee alter or renounce some religious belief in exchange for job benefits?

The issue here is not if Ilic misunderstand what constitutes direct evidence, issue is that district court finding must, as initial matter, specifically state whether or not it believes Ilic's proffered direct evidence of discrimination and/or retaliation and in view of proffer of such direct evidence, it was incorrect of the trial court to apply McDonnell-Douglas test without reference to such evidence. See Thompkins.

Also, the issue is in this case that the Eleventh Circuit is in direct conflict and inconsistent with precedent set in Thompkins v. Morris Brown College, 752 F.2d 558 (11th Cir. 1985) and Caban-Wheeler v. Elsea, 904 F.2d 1549 (11th Cir. 1990).

In Thompkins the Eleventh Circuit state:

> Thus, this case must be remanded to the district court for a determination of whether Threatt and

> Payne made the discriminatory statements. If the district court finds that the statements were made, it must enter judgment for Plaintiff. See Lewis v. Smith, 731 F.2d 1535 (11th Cir. 1984). If the court finds that the statements were not made, it must clearly articulate this finding.

Decision in the instant case, that there is simply no merit in any of the issues or contentions presented by the appellant is inconsistent with Lewis, Thompkins and Caban-Wheeler. The Court should grant the Ilic's petition to resolve the issue.

3. Respondent on this issue of promotion talk about that Magistrate did state the applicable legal standards and that District Court adapted this Report, which is not a issue here. (Opp. 3) It is a common knowledge that District Court "rubber stamp" Magistrate's Reports.

First, Magistrate finding state: "... although there is evidence from which a finder of fact could find a prima facie case to have been established, I find that the Plaintiff has not proven facts that satisfy the, ..." It is clear that this Magistrate is bias and if Ilic had another Magistrate he would have been qualified for promotion. This is another indication that District Court just "rubber stamp" Magistrate Report.

Second, there is another finding inconsistent with first that state: "Ilic has not proven that he was qualified for the promotions in question and thus has not established a prima facie case of discrimination with regard to his failure to promote claim."

This finding is clearly erroneous because, Respondent thought that Ilic was qualified to manage the Plant for four weeks in 1989 and to be offered another management position in 1990. (This Brief 4-5).

Magistrate finding state: "Ilic points to incidents involving Bostian and Thompson which he believes should have disqualified them from promotion consideration." Let see if this Court agree with Ilic.

Incident about Mr. Bostian was described by Mr. Dave Burnett, plant manager in his letter: "After a full and complete investigation ... I am by this letter terminating your employment ... you were observed sleeping on the job." He was reinstated two weeks later and after one year being in Orlando plant he was promoted .

Mr. Thompson was also, in Orlando plant for a year before his promotion.

Incidents of Mr. Thompson were described by:

Testimony of Mr. Perkins on confrontation with secretary: "... it was many yelling and name calling between him and secretary. The doors were closed to the office and there was a lot of yelling, name calling." Confrontation with Mr. Perkins: "Threatened, verbally ... he just shook his finger in my face. ... he was going to stop any lies or rumors going around in any way possible or any means available."

Testimony of Mr. Eller state: "See again, there were three different confrontations and the third one was when there was a plant manager there and he stepped between us (Ferguson) .. Well, he felt there was a need to get between us so - there wouldn't be physical contact. First confrontation, there were threats made that people would be hurt? Or legs broken, or knees broken. Said to you in your face? Right at my face."

Testimony of Mr. Ferguson state: "There was a very heated argument within the control room between Mr. Thompson and Mr. Eller. I stepped in between the two and separated and told them both to leave the office and disperse."

Misconduct with Federal Express driver explained by letter and testimony of Ms. Fawn Clark: "... he was very mad. It was very obvious., ... the Federal Express driver came back in the office in a big hurry, you could tell she was very upset and scared., ... to call in before that man (Charles) hit her., ... He was yelling, screaming, and cursing., ... When he returned he was still raving mad., ... he was tired of the Bullshit., ... Bruce had told me how crazy Charles gets when he is mad, but I have never seen him this bad. ... I was literally shaking, I was so upset." This was three months before Ilic's termination and probably on the day he received charge from EEOC.

As seen in the above paragraphs Magistrate findings that state: "Even if the events occurred as Ilic described them,.. The incidents in question were isolated in nature ..." are clearly erroneous. (Pet. App. E, 14a).

First, in case of Mr. Thompson, events were described by Mr. Perkins, Mr. Eller, Mr. Ferguson and Ms. Clark and in case of Mr. Bostian by Mr. Burnett.

Second, in case of Mr. Thompson the incidents are not isolated in nature but a pattern of behavior.

The Magistrate finding state: "The facts surrounding these incidents are in dispute, but need not be decided here." Where is this going to be decided? The Court should grant the Ilic's petition to resolve the issue.

This is where Lewis come to play. The Magistrate did not explain what objective criteria was used in his finding that Ilic was less qualified then Mr. Bostian and/or Mr. Thompson.

Also, some facts about Mr. Thompson's credibility. A letter by Mr. Lucht raising questions of falsification on employment application; two days after he received charge of discrimination he wrote a memo about Ilic; he admits "Yes, I was incorrect in my memo ...., he stated that he was asked by Mr. Smith to write this memo, Mr. Smith stated that he did not; thirty (30) days before Ilic's termination Mr. Smith testified that report has been made that Mr. Thompson had falsified FDA records. There is more!

And from the fact that there was no investigation by his superiors (testimony of Mr. Smith: Q. "So you didn't attempt to determine whether the facts, what have been alleged to be the facts by Mr. Thompson was true? A. If talking to Mr. Ilic, no. Q. So you solely relied on Mr.

Thompson? A. Yes. ... Q. The termination? A. Yes, solely was Charles. Q. No witnesses? A. No witnesses."; testimony or Mr. Fraeyman: "Q. Was there an investigation that led up to his termination? A. Which investigation?") and fact that Mr. Thompson had motive (if Ilic wins his case with EEOC, Mr. Thompson stand to loose his position) retaliatory intent has been proven.

This is the case where the circumstances of Ilic discharge were such as to promt inquiry into the basis therefor by the assistant manager superiors, and where the superiors failed to investigate and quickly acquiesced in the assistant manager determination that Ilic should be fired. Taylor v. Safeway Stores, 365 F.Supp. 468 (D. Colo. 1973). Also, where the employer's supervisory personnel acquiesced and participated in retaliation, the burden on an employer seeking to avoid Title VII liability is especially heavy. Katz v. Dole, 709 F.2d 251 (4th Cir. 1983), Weiss v. United States, 595 F.Supp. 1050 (1984). Respondent did not carried this burden. The Court should grant the Ilic's petition to resolve the issue.

4. Respondent on the issue of fabricated memos argue that Ilic did not append the documents or relevant

trial testimony. First, Ilic have limited resources, PC with limited RAM and hard drive memory and software that could not do the job. Second, the issue here is that Magistrate finding did not address the issue of fabrication of these five memos and two statements. See Caban-Wheeler.

Decision in the instant case, that there is simply no merit in any of the issues or contentions presented by the appellant is inconsistent with its own precedent.

III. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE QUESTION WHETHER THE ELEVENTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Respondent argue that this case does not present a special and important reason for the Court's supervisory authority review. Ilic will show and the Court will agree that this Court's supervision is needed.

Ilic presented eleven (11) issues an his appeal in a fifty (50) pages brief. As shown in Ilic's Petition and this

Brief, the Eleventh Circuit decision that there is simply no merit in any of the issues or contentions presented by appellant, is a logical impossibility and/or without any common sense.

The officers of the court Mr. Bulger and Ms. Foissotte have with impunity fabricated facts twenty (20) days before Ilic's termination: ... Ilic told several of his co-workers that he was carrying a gun. (Pet. App. G, 19a) ... the Company discovered that Ilic was carrying a gun on his person while at work. (Pet. App. H, 20a). There is more!

First, not only that they are not punished for this but worst of all is that they win the case with EEOC and Respondent win case in the District Court and in the Court of Appeals. Also, there is nothing in Magistrate findings about these proven fabrications.

Second, they state: "Also, please be aware that Liquid Air considers this position statement confidential and does not consent to the use or admission of the statements made herein as evidence in any administrative or other proceeding. (Pet. App. H, 19a). Ilic, pro se, in short understand this as: "We are lying but you can not use these lies against us."

Third, Respondent admits that they used same to terminate Ilic. Testimony of Mr. Smith: "Q. All right. And had the Chicago law firm, to your knowledge, have any involvement or input when the decision was made to terminate Mr. Ilic? A. Yes."

The Magistrate did not address these proven fabricated facts of retaliation. Ilic's claims that the Magistrate failed to consider his claim that defendant's/respondent's rationale was pretextual, thus failing to apply the third prong of the McDonnell-Douglas test.

Also, officer of the court Mr. Rock tried to pass a document as an original, and after testimony of Forensic Document Examiner that this document is a photocopy, with impunity he introduces same photocopy as an original. THE COURT: "Original document?" MR. ROCK: Yes, sir." This is false representation of a document. Not only that this officer of the court was not punished but he wins this case.

Actions of these officers of the court are improper and unethical to say at least.

Ilic has shown that proffered explanation is unworthy of credence is a matter of examining Respondent's vacillations.

Liquid Air understands that one or more drivers have stated that Ilic was carrying a gun on his person while at work. Liquid Air does not know the identity of such driver or drivers and does not know if he or they searched Ilic. (Pat. App. I, 21a).

The Magistrate finding that "Ilic has not established a prima facie case of discriminatory discharge is confusing because he applied the wrong legal standard and inadequately analyzed Ilic's claim of retaliation. (Pet. App. E, 15a). Ilic claimed retaliatory discharge, not discriminatory discharge.

The Magistrate finding: "Further, Ilic has not shown that his national origin or religion had anything to do with the way he was treated regarding the discipline he received, including the incident involving the FDA report." (Pet. App. E, 13a) is clearly erroneous.

Here the Magistrate finding is confusing, he is looking for direct evidence in disparate treatment analysis with circumstantial evidence. Ilic claims that the Magistrate

failed to consider his claim that defendant's/respondent's rationale was pretextual, thus failing to apply the third prong of the McDonnell-Douglas test.

In incident involving the FDA report Ilic proved that "business necessity" defense "attitude" articulated by Respondent was mere pretext for discrimination and/or retaliation.

FDA report state: "There are no written procedures..., analytical records do not have the initials or signature ... He stated that he would contact corporate headquarters the following day to obtain written procedures for production and process control." (Pet. App. K, 22a-23a). In his testimony Mr. Fraeyman admits that he is blaming Ilic for a lack of procedures at the plant. (Pet. App. L, 23a). This has been shown in his letter. (Pet. App. J, 22a). HOW CAN ILIC BE BLAMED AND HAVE "ATTITUDE" FOR SOMETHING THAT DO NOT EXIST AND IS COMPANY RESPONSIBILITY? There is more!

The Eleventh Circuit decision that there is simply no merit in any of the issues or contentions presented by appellant has so far departed from the accepted and usual

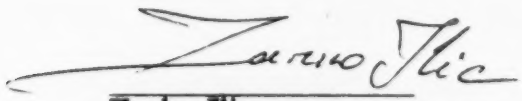
course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

As seen in Petition and in this Brief it has been GROSS MISCARRIAGE OF JUSTICE done to Ilic. Ilic have high hopes that this Court have power and will to correct it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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